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No. 91-356

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

THE MEAD CORPORATION,

v.

*Petitioner*B. E. TILLEY, *et al.*,*Respondents*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF IN OPPOSITION*Of Counsel*

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EDITOR'S NOTE

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QUESTION PRESENTED

Whether the Court below properly interpreted Article XIII, § 4(f) of the Mead Industrial Products Salaried Pension Plan, which, if the plan is terminated, mandated satisfaction of "benefit rights and contingent rights accrued under the plan," to require payment of earned early retirement benefits to four employees who met the plan's 30-year service requirement for such benefits but had not yet reached the plan's early retirement age (62) and to a fifth employee who had reached age 61 and had 28 years of service?

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On Petition for a Writ of Certiorari to the
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BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

Respondents, five former employees of the Lynchburg Foundry Company, a subsidiary of The Mead Corporation ("Mead" or "Corporation"), brought suit in the United States District Court for the Western District of Virginia over seven years ago, claiming that Mead improperly took \$11,000,000.00 in assets from the employees' trust without discharging the plan's liability for early retirement benefits that employees had accrued through their service for the Corporation but had not yet qualified for when Mead terminated the plan. Four employees had performed more than the 30 years' service required to qualify for the benefits but had not yet reached the plan's early retirement age (62). A fifth employee, who was age 61, had 28 years of service. On average, the difference between the value of the unreduced contingent early

retirement benefits that the plan failed to discharge and the plan's normal retirement benefits was \$9,000.00.¹

The employees lost in the District Court and won in the Court of Appeals for the Fourth Circuit. On *certiorari*, this Court reversed and remanded the case back to the Court of Appeals which again ruled in the employees' favor, but on a narrow plan interpretation ground. Mead now seeks to bring this case to this Court once again.

The employees contended on brief and in oral argument in the Court below (as Justice Stevens had suggested in his dissent from this Court's decision to remand rather than decide this case) that the peculiar language in Mead's plan obligated the plan to satisfy contingent early retirement benefits because Mead could only withdraw assets from the employees' trust "after the satisfaction of benefit rights or contingent rights accrued under the plan."² Article XIII, § 4(f).

The Circuit Court found it "unnecessary to resolve the apparent conflict between current practice [of the IRS with respect to early retirement benefits generally] and legislative and regulatory history" and concluded that early retirement benefits earned by employees based on their years of service were "'contingent rights' because the plan was liable to pay them on a contingency, i.e., the plaintiffs' satisfaction of the age and service requirements." (App. 13a.) That Court observed that "requiring the employees to have satisfied the conditions for the benefit, making it vest, would make a nullity of the con-

¹ Mead will retain most of the \$11,000,000.00 it took from the employees' trust, regardless of whether the lower Court's decision is left undisturbed.

² Contrary to petitioner's claim, the ground relied upon by the Court below was presented in respondents' brief below. See Brief of Appellant pages 38-39 (Fourth Circuit) (App. 6a) (early retirement benefits "Should Have Been Paid Upon Termination Pursuant To Article XIII, 4(F) Of The Plan").

cept of contingent rights, which are protected by the terms of the Plan." (App. 14a.)

Quoting Justice Stevens' opinion, the Court of Appeals further rejected Mead's contention that the employees' rights to benefits were "mere expectancies." (App. 15a.) The Court found that the participants had relied upon the plan provisions and that they had in fact earned the benefits through their service. (App. 15a.) Mead prevented the employees from reaching the early retirement age while the plan was in operation by unilaterally terminating the plan. The Court pointed out that ERISA required Mead to provide for these contingent rights by funding them as they were earned. (App. 15a.) See Justice Stevens' dissenting opinion. (App. 47a, & n.3.) The Court of Appeals further recognized one of ERISA's central policy goals to be protection of the interests of employees and to guard against the abrogation of retirement benefits for which employees have been working. (App. 15a, citing 29 U.S.C. § 1001 and *Shaw v. Delta Airlines*, 463 U.S. 84, 90 (1983)).

Alternatively, the Court below held that under Article XIII, § 4(f) of the plan, Mead could recover only the "surplus remaining in the fund, due to actuarial error." (App. 12a-13a.) The Court declined to interpret the term "'actuarial error,' as used in Article XIII of the Plan, so as . . . to mean the error of correctly calculating the contribution to a fund in expectation of paying a benefit that the company later decides to cancel." (App. 13a.) Mead therefore could not recover the contributions used to fund the plan's early retirement benefits because Mead decided to cancel them. That, the Court ruled, was not an "actuarial error" as defined in this particular plan.

Having rested its decision solely on plan language, the Court found it unnecessary to determine whether Mead's failure to pay or provide for early retirement benefits

also violated the terms of the Internal Revenue Code and of ERISA as they stood in 1983.³

SUMMARY OF ARGUMENT

The issues remaining in this litigation are of interest only to the parties. The Court of Appeals correctly decided this case on a narrow ground of plan interpretation, a factual determination that does not justify *certiorari*. *United States v. Johnson*, 268 U.S. 220, 227 (1925); *Texas v. Mead*, 465 U.S. 1041 (1984) (Stephens, J.); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 226-227, n.2 (1975). The plan created "contingent rights" to retirement benefits which in fact do accrue under the plan, in the sense that the value of the benefit increases with each year that the employee serves the employer. Mead's attempt to cabin the plan language within the confines of the statute presents no more than a factual controversy, and the Court below, far from disregarding the views of the agencies, found support for its reading of the plan in an IRS regulation extant in its present form since 1943. The Circuit Court's alternative ground based upon the plan's restriction upon the withdrawal of funds to those remaining in the plan due to "actuarial error" was also reasonable in light of the specific language of the Mead plan.

Neither the IRS nor the PBGC, at the time Mead alleges they "approved" Mead's termination, reviewed Mead's decision not to pay or provide for early retirement benefits. PBGC merely found the plan's assets "sufficient" to pay PBGC *guaranteed* benefits, and early retirement benefits are not now and were not in 1983 guaranteed. The IRS merely advised Mead that the plan might lose its qualified status "if plan assets are returned to you [Mead] before the plan's liabilities to

³ Congress has substantially amended the relevant provisions of the Internal Revenue Code and ERISA since 1983, when this case arose. See, *infra*, pp. 18-20.

participants are satisfied. . . ." The Court did not disregard the agencies' views on the statutory questions; it rested its decision on the plan document.

The only statutory issue conceivably touching on the lower Court's decision does not warrant review because Congress amended ERISA and the Code effective July 31, 1984, after this suit was filed, to clarify the law protecting early retirement benefits. That change in the statutory landscape drains this case of whatever importance it might once have had since statutes of limitations bar suits in most states arising out of pre-REA terminations like this one. Were the Court to decide this case under old law, as it would be obliged to do, it could readily sow confusion as to the proper interpretation of REA itself. This Court does not ordinarily grant *certiorari* when a change in the legal landscape occurs, and this is not a case warranting an exception to that practice. Consideration of the intervening legislation, should it prove necessary, should await a case governed by that legislation.

None of the opinions Mead cites establishes a conflict among the circuits. One is unpublished, and thus has no precedential value, and all of them are distinguishable or reflect inapplicable, post-REA rulings.

Mead's arguments based on PBGC's "exposure" if this case is allowed to stand is based on a plain misreading of the Notice of Sufficiency which PBGC issued to the plan (and to others), and to which we alluded above. Our research, and that of the AARP, an amicus below, establishes that far from appearing in "virtually every plan," the particular language the lower Court construed is highly unusual, if not unique. The flood of cases Mead predicts is a chimera. In the nearly five years since the District Court first ruled in respondents' favor, litigation involving a terminating plan's failure to pay or provide for early retirement benefits under the pre-REA law has arisen, so far as we can determine, with respect to only

two other plans. Under all these circumstances, *certiorari* should be denied.

REASONS FOR DENYING THE WRIT

I. THE LOWER COURT CORRECTLY INTERPRETED THE LANGUAGE OF MEAD'S PLAN AND THAT DETERMINATION DOES NOT WARRANT FURTHER REVIEW.

A. The Lower Court Correctly Found That The Early Retirement Benefits In this Case Were "Contingent Rights" Under Plan Article XIII, Section 4(f).

The lower Court's decision correctly interpreted the peculiar text of the plan before it and thus does not warrant further review. Article XIII, § 4(f) of this plan provided for the payment of "contingent rights," and that provision is entitled to enforcement regardless of whether, as Mead contends, ERISA and the Internal Revenue Code would not have required the satisfaction of the particular contingent liabilities at issue here.⁴

Unlike many other plans that, quoting Internal Revenue Code § 401(a)(2), prohibit an employer from taking assets from an employees' trust "at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust," the Mead plan required the prior satisfaction of "benefit *rights* and *contingent rights* accrued under the plan." Article XIII, § 4(f) (emphasis supplied).⁵ This language, which so far

⁴ Contrary to petitioner's assertion, the separability clause of the plan did not nullify any plan provisions that were "inconsistent with the Code or IRS regulations." Pet. p. 13. Instead, the clause dealt only with provisions that were "illegal, unenforceable, or in conflict with" the Code. This is hardly a rule of construction equating plan language with the minimum requirements of the statute.

⁵ One significant distinction between the plan language and the statutory language is that the statute refers to *liabilities* of the

as we have been able to determine is unique,⁶ required the payment of early retirement benefits respondents earned by long years of service.

Not only does the word “contingent” aptly describe the benefit right here, but the benefits were also “accrued under the plan” in the sense that the size of an employee’s benefit increases with each year of service the employee renders to the employer.⁷ *See also, Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1172 (11th Cir. 1988) (en banc) (explaining accrual concept). The lower Court’s interpretation of a contingent right is, as the Court noted, consistent with a still ex-

plan, thus focusing on the obligations the plan has under applicable law. The document here referred to the “*contingent rights*” to *benefits* that had “accrued under the plan,” thus focusing on the participants and the benefits they had earned under the plan benefit formula but whose payment was *contingent* on satisfaction of future eligibility conditions. Given the great care and precision with which highly skilled professionals draft pension plans, the Court would have been amply justified in inferring that the draftsman would have used the statutory language had it been his/her intent solely to satisfy statutory requirements.

⁶ *See, infra*, p. 22.

⁷ The Court below described the plan’s benefit structure :

The Plan offered both normal retirement benefits and early retirement benefits. Normal retirement benefits, payable at age 65, were calculated with reference to a participant’s earnings and years of service. Participants became eligible for early retirement benefits at age 55. Early benefits were calculated in the same manner as normal retirement benefits, but the amount payable was discounted by five percent for each year that the participant retired prior to the normal retirement age of 65. However, if a participant had 30 years or more of credited service, then he or she could retire at age 62 and still receive the normal retirement benefits payable at age 65 without any reduction.

(App. 3a.) There is no difference in the way that the early retirement benefits and normal retirement benefits accrue under the plan benefit formulas. In form and structure the benefits are identical; the only difference between them is the eligibility condition. *See*, App. 92a, 94a.

tant 1943 Treasury Regulation which explains that the distinction between employees who have, and those who have not, "satisfied all requirements for a monthly pension . . ." such as having completed ". . . the required period of service . . ." is that the plan's liability to the former group is "fixed" while the liability to the latter group is "contingent." 8 Fed. Reg. 9351-53 (1943), 26 C.F.R. § 19.165(a)(2)-1(b)(2), now Treas. Reg. § 1.401-2(b)(2). Both types of liabilities have to be satisfied on plan termination prior to the diversion of any remaining assets to the employer. *Id.* Treas. Reg. § 1.401-2(b)(2) (1980). (App. 13a-14a.)

Petitioner argues that the term "contingent rights accrued" in the plan document dictates that the "contingent rights" be interpreted as referring to the statutory accrued benefit under Internal Revenue Code § 411(a)(7), 26 U.S.C. § 411(a)(7), which, under ERISA, is the statutorily defined benefit in which employees must vest in accordance with a statutory timetable.⁸ The Court below correctly noted that "[t]he Plan incorporates no such reference to § 414(a)(7)'s concept of 'accrued benefit,' nor does the Plan manifest an intent to effect such an incorporation."⁹ (App. 14a.)

Indeed, the plan included a separate provision, Article XIII, § 4(h), which provides for vesting of *the* accrued benefit on plan termination, as required by § 411(d)(3) of the Internal Revenue Code, 29 U.S.C. § 411(d)(3).

⁸ See, Internal Revenue Code § 411(a)(2). The statutory definition of accrued benefit does not mean that other benefits do not "accrue," i.e., are earned pro rata. It means simply that the plan need not provide that other benefits must vest pursuant to the timetables in § 411(a)(2).

⁹ IRS rulings and prudent actuarial practice required petitioner to accumulate funds necessary to pay early retirement benefits. See *infra*, p. 10. Such benefits were thus either "currently accruing retirement income" or "other benefit liabilities" under the plan. See Plan Article XII, § 2(b).

Article XIII, § 4(f)'s requirement that the plan satisfy "contingent rights" before paying a reversion would have been unnecessary if "contingent rights" had the same meaning as the term "benefits accrued" under § 4(h). The Court's interpretation of "contingent rights" avoids treating § 4(f) as superfluous and on that ground also is a reasonable construction of this plan.

Petitioner also urges that the plan's references to "contingent rights accrued under the plan" must be read in light of a 1953 revenue ruling providing that "contingent liabilities are the benefit credits accrued up to the time of termination of the trust for employees." (Pet. p. 21). Petitioner equates the phrase "benefit credits accrued" in the ruling with the ERISA § 411(a)(7) "accrued benefit," a statutory concept created by Congress 21 years after the IRS promulgated the ruling in order to flesh out ERISA's requirement that employees have some vested pension right after a stated number of years of service. H.R. Rep. No. 807, 93rd Cong. 2d Sess. 60 (1974), reprinted in II Legislative History of ERISA at 3115, 3180 (1976); Boren, Qualified Deferred Compensation Plan § 3:22-76. Petitioner's argument is impossibly anachronistic. Moreover, petitioner's quotation of the Revenue Ruling is misleadingly incomplete. The full sentence in the ruling states that "Contingent liabilities are the benefit credits accrued up to the time of termination of the trust for employees (and their beneficiaries) who might have become entitled to benefits if the trust had been continued indefinitely." The Court's interpretation of the Mead plan, unlike Mead's, is thus in consonance with the ruling and with a consistent line of IRS' authority called into question for the first time in this case.

The Court below did not disregard this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), as petitioner argues. (Pet. p. 20, n.11.)

Mead tardily first argued on rehearing that the panel had failed to defer to Mead's "reasonable" interpretation of its plan. *Firestone* teaches that courts should apply an "arbitrary and capricious" standard of review to the interpretations of a fiduciary body expressly authorized to exercise discretion in interpreting a plan and not operating under a conflict of interest. However, the record in this case showed that the Administrative Committee, the body granted discretion to interpret the Mead plan (App. 110a-112a) had not ruled on respondents' claim. A single member, Mead's Director of Benefit Planning, acted for the plan. He lacked authority to exercise discretion under the plan, and, as a top-level Mead employee, was laboring under a conflict of interest since Mead would receive additional money in the termination if he ruled in its favor. Under the circumstances, the Court of Appeals was free to interpret the plan *de novo*, as *Firestone* held. *Firestone Tire & Rubber Co. v. Bruch*, 289 U.S. 101, 111 (1989). See also, *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1052 (7th Cir. 1987) (Posner, J.) (when person interpreting plan has conflict of interest, no deference is accorded).

B. The Lower Court Correctly Held In The Alternative That Assets Remaining In the Plan Because It Did Not Pay Early Retirement Benefits Were Not Due To Actuarial Error.

The Circuit Court also correctly held, in the alternative, that since "[p]etitioner was required both by IRS rulings and by prudent actuarial practice to accumulate the funds necessary to pay early retirement benefits," Justice Stevens' dissenting opinion, App. 47a, *see, id.* n.3 citing authorities), those assets did not remain in the plan due to "actuarial error," which the plan made a condition upon Mead's taking assets held in trust for

its employees.¹⁰ The Circuit Court did not hold, as Mead claims, that Mead could not recover assets left in the plan *after* the plan discharged its obligations for subsidized early retirement benefits. The portion of the surplus the Court held “. . . not due to ‘actuarial error’ ” was the surplus “. . . which remained in the Plan only because the value of the unreduced early retirement benefits were not paid. . . .” (App. 12a.) The Court commented that the phrase “actuarial error seems to reference computational error resulting from inaccurate statistical assumptions.” (App. 12a.) But that is not the Court’s holding. Rather, the Court explained its holding as follows (App. 12a-13a) :

. . . [i]f “actuarial error” means the cause of whatever remains in the Plan when a class of benefits, reasonably expected by participants and funded all the time the Plan is in operation, is terminated, then the phrase contributes no meaning to the contractual provision and is utterly redundant. More importantly, used in such a way, the word “actuarial error,” is rendered unnecessary. We interpret “actuarial error,” as used in Article XIII of the Plan, so as not to mean the error of correctly calculating the contribution to a fund in expectation of paying a benefit that the company later decides to cancel.

¹⁰ The language concerning “actuarial error” in Article XIII, is not, as Mead suggests, universal. Plans intending to provide that any assets remaining after satisfaction of all benefit liabilities are to be deemed due to “actuarial error” have little trouble saying so. In *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 878 F.2d 1164, 1170 (1988), for example, the plan provided that any assets remaining after satisfaction of plan liabilities “shall . . . be deemed to have become available as a result of actuarial error and shall be distributed to the employer in cash.” Similarly, in *Lynch v. J. P. Stevens & Co., Inc.*, 758 F. Supp. 976, 983 (D. N.J. 1991), the plan provided that “any funds not required to satisfy all liabilities of the Plan for benefits because of erroneous actuarial computations or otherwise shall be returned to the employer.” (Emphasis added.)

(App. 13a.) The Court's ruling does not prevent Mead from retaining most of the \$11,000,000.00 it took when the plan terminated.

Petitioner contends that the phrase "actuarial error" must be interpreted in conformance with a 1983 "key" revenue ruling released long after the plan had been drafted. (Pet. p. 4.) That revenue ruling holds that assets remaining after a plan satisfies all fixed and contingent liabilities are due to actuarial error. The lower Court's alternative holding is therefore consistent with the revenue ruling, for petitioner recovered assets before all "fixed and contingent liabilities had been satisfied," Rev. Rul. 83-52, 1983-1 C.B. 87, and is, in all events reasonable.

II. THE IRS AND PBGC POSITIONS DO NOT ESTABLISH THAT THE COURT BELOW MISREAD THE PLAN.

The Court below did not improperly disregard the views of the IRS and PBGC.¹¹ When the plan terminated, neither agency "approved" petitioner's determination not to pay or provide the early retirement benefits respondents had earned by their service. Compare Pet. p. 18. Before and after 1983, PBGC did not routinely review the treatment on termination of benefits like respondents', as petitioner implies. (Pet. pp. 18, 26.) Rather, as the Notice of Sufficiency in the record plainly demonstrates, PBGC reviewed information supplied by the Plan Administrator to determine whether "the assets of this [terminating] . . . plan will be sufficient as of your

¹¹ Contrary to petitioner, the Court below did not "acknowledge" a long-standing PBGC, IRS and actuarial association practice of not treating unreduced early retirement benefits as plan liabilities on termination. (Pet. p. 12.) The Court stated that petitioner argued that this was the case. (App. 10a.) It did not "acknowledge" that it was.

proposed distribution date to discharge when due all obligations of the plan with respect to *guaranteed benefits*.” (App. 158a.) (Emphasis added.)¹² In 1983 (as now), PBGC guaranteed only benefits that were “non-forfeitable,” i.e., “vested,” on the date of termination because a participant had by then satisfied all the plan’s requirements. *E.g.*, *Gray-Grimes Tool Co. Pension Plan v. Gray-Grimes Tool Co.*, 546 F.Supp. 102 (D. Mich. 1982) (explaining and quoting the PBGC regulations then in effect). Here, the benefits in question were not guaranteed by PBGC. Hence, PBGC’s 1983 cover letter which accompanied the Letter of Sufficiency merely authorized the Mead plan within 90 days to “complete the termination of the plan in accordance with . . . ERISA,” and requested that Mead certify that the distribution had been in accordance with the statute. (App. 156a) The PBGC’s 1983 letter assuredly did not approve Mead’s treatment of respondents’ early retirement benefits. (App. 158a.)

Likewise, the IRS’ favorable determination letter did not “approve” petitioner’s failure to pay or provide for respondents’ early retirement benefits. Rather than “approving” Mead’s decision to cancel earned early retirement benefits, the IRS informed Mead that, while termination would not disqualify the plan, the “plan’s qualified status will be adversely affected if plan assets are returned to you before the plan’s liabilities to all participants are satisfied by the purchase of guaranteed annuity contracts or the making of lump sum distributions.” (App. 160a.) The IRS never ruled on what liabilities were created under the plan’s language. Indeed, the application form completed by Mead to obtain a favorable determination letter did not even require Mead to indicate

¹² When this plan terminated, guaranteed benefits included, subject to certain dollar limits, nonforfeitable benefits under plan provisions in effect at least 60 months. ERISA § 4022, 29 U.S.C. § 1322 (1983).

whether it had satisfied contingent benefits. (See Resp. App. 6a).¹³

Moreover, the IRS has not at any time in this litigation disagreed with the lower Court's interpretation of the Mead plan in this case. Prior to that decision, the Service, by letter to the Court, addressed a broader statutory question, namely, whether "prior to the enactment of the Retirement Equity Act . . . early retirement benefits such as those provided in the Mead-sponsored pension plan, constituted 'liabilities' of the plan [under § 401 (a) (2) of the Internal Revenue Code] before any excess assets could revert to the plan's sponsor." The letter goes on to state the Service's view that "such pre-REA early retirement benefits were not plan liabilities within the meaning of Section 401(a)(2) of the Code." (App. 168a.)¹⁴

The IRS' letter to the Court below thus addressed only an issue the lower Court declined to decide, the reach of Internal Revenue Code § 401(a)(2). Moreover, this IRS position was announced publicly for the first time in this case—51 years after § 401(a)(2) was enacted—and conflicts with evidence produced by the American Association of Retired Persons in the court below showing that the IRS had taken a contrary administrative position prior to this case.¹⁵ Brief of Amicus Curiae American

¹³ See, IRS Form 5310 (Rev. Nov. 1982) (Resp. Br. App. 1a-4a). The form was in the record below. The application form has since been revised and now requires the applicant to indicate whether contingent early retirement benefits had been satisfied.

¹⁴ The IRS letter to the Court states that its position that "early retirement benefits were not plan liabilities within the meaning of Section 401(a)(2) of the Code . . . is set forth in detail in a letter of January 16, 1986, from the Acting Assistant Commissioner . . . to the General Counsel of the PBGC" We have searched the January 16, 1986, letter in vain for any reference, let alone analysis, of section 401(a)(2)'s requirements.

¹⁵ The only evidence of the IRS' prior position is the January 16, 1986, letter to the PBGC discussed in note 14, *supra*. The letter

Association of Retired Persons in Support of Appellants at 11, n.12. Given this kind of administrative vacillation, the court below would not have been obliged to give great deference to the IRS' position, *cf. North Haven Board of Education v. Bell*, 456 U.S. 512 (1982), which, in all events, related to the reach of the statute, not to the instrument the Court properly read as written.

Similarly, PBGC did not initially address the plan interpretation question the lower Court decided. In its brief supporting petitioner's suggestion for rehearing en banc, PBGC simply asserted that since early retirement benefits were not liabilities under § 401(a)(2) of the Internal Revenue Code they could not have been a "contingent right" payable under Article XIII, § 4(f) of the plan before plan assets reverted to Mead.¹⁶ PBGC did not

appears to represent an inter-agency treaty to reconcile the differences between PBGC and the Service arising out of the Service's successful attempt to persuade the Court of Appeals in a pre-REA case, *Amato v. Western Union International, Inc.*, 773 F.2d 1404 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986), that a subsidized early retirement benefit was an "accrued benefit" which Int. Rev. Code § 411(d)(6) forbade eliminating by an amendment. *See*, 773 F.2d 1404, 1412. The letter draws an untenable distinction. According to the letter, the same benefit is to be treated as an "accrued benefit" if a plan sponsor attempts to eliminate it by amendment, or if the plan is *partially* terminated, but not if the employer completely terminates the plan. Section 411(d)(3) of the Code expressly mandates that "accrued benefits" be paid, to the extent funded, upon termination or *partial termination*. Furthermore, termination of a pension plan *requires* amendment, as Congress recognized when it enacted REA. Compare H.R. Rep. No. 655, 98th Cong., 2d Sess., pt. 2, 42 (1984) (House version of REA) with Sen. Rep. No. 98-575, 98th Cong. 2d Sess. 31 (1984). Congress intended, and the Service has agreed, that REA applies to plan terminations, though the statute it enacted refers only to *amendments*. Sen. Rep. No. 98-575, *supra*.

¹⁶ Congress has, in another context, "recognize[d] that the PBGC is not (and should not be) in a position to determine whether a proposed termination violates the contractual and statutory rights of any affected parties. Rather, this determination must ultimately

explain why the plan could not confer rights greater than those afforded by law and its view mocks the fundamental concept that ERISA and the Internal Revenue Code create "minimum standards" for pension plans.¹⁷ The Court below simply was not obliged to defer to views that the Internal Revenue Service never expressed before this litigation, nor views the PBGC asserted but never adequately explained.

III. POST-1983 AMENDMENTS TO ERISA HAVE DRAINED THE STATUTORY QUESTIONS MEAD SEEKS TO PRESENT OF THE SIGNIFICANCE THEY ARGUABLY HAD WHEN THIS LITIGATION BEGAN.

To make this case appear more important than it is, Mead invites the Court to treat the holding as an interpretation of the relevant statutes, as they stood in 1983, rather than as an interpretation of the text of the Mead plan. But even if the decision below were read implicitly to decide a statutory, rather than a plan interpretation question, the case would not warrant further review because after the Complaint was filed and while this litigation was pending, Congress enacted the Retirement Equity Act, P.L. No. 397, § 301(a)(2), 98 Stat. 1426, 1451, 98th Cong. 2d Sess. (1984) ("REA"). REA amended Internal Revenue Code § 411(d)(6)'s rule prohibiting the reduction of an "accrued benefit" to reach elimination or reduction of early retirement benefits and retirement-type

rest with the appropriate adjudicative agency, government agency or Court, as the case may be . . . the Committee also believes that the PBGC should not, by its actions in processing a proposed termination, effectively decide a dispute and preclude other affected parties from obtaining the relief to which they may be entitled . . ." H.R. Rep. No. 241, 99th Cong. 1st Sess., Pt. 2, at 44-45 (1985).

¹⁷ See, e.g., Int. Rev. Code §§ 410, 411 (catch lines). See also, Brief of Amicus Curiae Pension Benefit Guaranty Corporation in Support of Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc. (App. at 187a.)

subsidies, the benefit involved here, REA's legislative history, which "clarified" the law, Sen. Rep. No. 98-575, 98th Cong. 2d Sess. at 27-28 and an IRS ruling interpreting the amended prohibition, Rev. Rul. 85-6, 1985-1 C.B. 133, make clear that the protection REA affords to early retirement benefits applies to plan terminations as well as to plan amendments. Consequently, in post-REA terminations, unlike this one, claims for early retirement benefits would be governed by REA. (App. 10a, n.3.)

REA's amendments to § 411(d)(6) are generally effective with respect to plan amendments and terminations occurring after July 30, 1984. Retirement Equity Act, P.L. 98-397, 98 Stat. 1429 § 302(d). Consequently, statutes of limitations on most pre-REA claims have now run in 41 states and the District of Columbia and will run in a 42nd state in 1992. (Resp. Br. App. 5a-7a.) Of the remaining states, only two, Ohio and Kentucky, have statutes that run more than ten years, and given the passage of time since REA's effective date, laches will be available to protect defendants harmed by the delay. *See*, generally, Dobbs, *Handbook On The Law Of Remedies*, 43-44 (1973) (laches operates even though statute of limitations has not run). Moreover, we have found only two other pre-REA plan terminations since the original Fourth Circuit opinion in which employees have challenged a plan's failure to satisfy early retirement benefits. Petitioner's prediction that the Fourth Circuit's decision, if left to stand, will flood the Court with litigation and overturn thousands of settled terminations is implausible.

The authors of two recently published treatises on ERISA agree that this case is unimportant in light of changes in the law. BNA's just published treatise, *ABA Section of Labor and Employment Law, Employee Benefits Law* p. 421, n.250 (1991), states that "The scope of this decision is limited because the law has changed to require payment of certain early retirement benefits and

to require satisfaction of all 'benefit liabilities' before a plan can be terminated as a standard termination and excess assets recovered." Another ERISA treatise, edited and written by prominent attorneys, actuaries and consultants, notes that this case "involved a 1983 termination before a number of changes in the law." Wald & Kenty, *ERISA, A Comprehensive Guide*, at 286 (1991).

This is obviously the wrong case in which to consider the proper construction of REA, and post-REA legislation enacted after the Mead plan terminated. Although REA does not apply, were this Court to decide this case, the lower Courts and the bar would closely scrutinize its opinion for hints as to the proper construction of REA, thus creating confusion and uncertainty. Far better to confront questions concerning the proper interpretation of the later statute in a case arising under it. It is familiar learning, of course, that this Court will not ordinarily grant *certiorari* to decide issues whose significance has been drained by subsequent legislation, as the questions in this case have been. See, e.g., *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1954). Respondents, five retirees who brought this case over seven years ago, should not have to bear the burden of litigating issues that, should they arise at all, will arise in the context of a reshaped statutory landscape.

IV. THE DECISION BELOW DOES NOT CREATE A CONFLICT AMONG THE CIRCUITS.

None of the cases petitioner cites conflicts with the decision below, let alone create "... an embarrassing conflict of opinion and authority between the circuit courts of appeal" that this Court requires to justify *certiorari*. *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1950).

There is no such conflict with respect to the meaning of the phrase in a pension plan "contingent rights accrued under the plan." *Nobers v. Crucible Inc.* 1975

Salaried Retirement Plan is an unpublished opinion of the Third Circuit (App. 161a), where “. . . only published opinions have precedential value.” Rules of the Third Circuit, IOP 5.6 *published in* U.S.C.A. 1991 Supp. In all events, the opinion interpreted the pre-REA statutory requirements of ERISA § 4044(d)(1)(A) and not the terms of a particular pension plan and thus creates no conflict. *May v. Houston Post Pension Plan*, 898 F.2d 1068 (5th Cir. 1990) (per curiam), is irrelevant. It rejected a participant’s contention that the amount of his monthly retirement benefit from a terminating plan should have reflected future service. Respondents did not contend and the Court below did not hold that the amount of their early retirement benefits should be based upon *future* service accruals. Moreover, *May* is a post-REA case and did not involve early retirement benefits.

Nor is there a meaningful conflict among the circuits on the proper interpretation of “actuarial error” when used in a plan document. In *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 648 F.2d 1164 (11th Cir. 1988) (en banc), the Court did not interpret a plan provision that limited reversion to any surplus existing “as a result of actuarial error” (Pet. p. 19) because the plan expressly defined that term. “Paragraph 11 of Article XI [of the plan], as amended, states that any assets remaining after the plan’s liabilities are met ‘shall . . . be deemed to have become available as a result of actuarial error and shall be distributed to the Employer in cash.’” *Id.* at 1170 (emphasis added). This contractual language says explicitly what Mead contends the very different language in its plan should have been interpreted to say. In that context, the Court found “the plan’s reversionary provision mirrors the regulatory provision of § 401(a)(2).” 848 F.2d 1164, 1170. Furthermore, the Eleventh Circuit *distinguished* this case, noting that “Neither *Amato* nor *Tilley* awarded benefits based on an employee’s expected future years of service,” *id.* at 1173,

but rather based benefits on actual years of service. That distinction, of course, is sound.¹⁸

Petitioner also contends that *International Union, UAW v. Dyneer Corp.*, 747 F.2d 335 (6th Cir. 1984), a *per curiam* opinion that does not deal with cancellation of early retirement benefits on plan termination, creates a direct conflict. *Dyneer* held that the actuarial-error limitation restricts recoverable surplus to surplus assets remaining "when fixed and contingent liabilities are discharged through the purchase of a contract or contracts from an insurance company with respect to individuals for whom the liabilities are determined." The Fourth Circuit held that the Mead plan, by failing to pay early retirement benefits, had not satisfied all liabilities. There is thus no conflict between this case and *Dyneer*.¹⁹

In all events, the lower court's interpretation of the phrase "actuarial error" is an alternative ground on

¹⁸ All those distinctions aside, *Blessitt* did not involve unreduced early retirement benefits which, of course, creates the controversy here. (App. 3a.)

¹⁹ Mead also cites two District Court cases, affirmed without opinions, as having "approved constructions of 'actuarial error'" that conflict with the Fourth Circuit decision. (Pet. at 19-20.) One Court quoted a proposed plan provision containing the phrase but neither discussed its meaning nor considered the phrase in the context of a cancellation of early retirement benefits. *In Re C.D. Moyer, etc.*, 441 F. Supp. 1128 (E.D. Pa. 1977), *aff'd without opinion*, 582 F.2d 1273 (3rd Cir. 1978). The other explained that the Treasury Regulation using the phrase is designed to assure that the employer provides "defined benefits" but does not validate participants' claims to "accidental overfunding." *Washington Baltimore Newspaper Guild Local No. 35 v. Washington Star Co.*, 555 F. Supp. 257 (D.D.C. 1983), *aff'd without opinion*, 729 F.2d 863 (D.C. Cir. 1984). The Fourth Circuit here held that the overfunding was not "accidental" but was due to the cancellation of the plan's defined, early retirement benefits. No such cancellation occurred in the *Guild* case. The Appellate Court affirmances without opinion do not establish any conflict, let alone an "embarrassing conflict," among the circuits.

which the panel was sharply divided. In light of the procedural posture of this case, whether the Fourth Circuit will adhere to or distinguish that ground should future cases arise is an open question. "*Certiorari* is granted only 'in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387." *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1950). This is not such a case.

**V. THIS CASE THREATENS NEITHER TO PROVOKE
A FLOOD OF LITIGATION NOR TO ENDANGER
THE SOLVENCY OF PBGC.**

In an attempt to confer upon this case an importance it does not have, Mead has conjured up an imaginary parade of horrors that do not withstand analysis. To accomplish that objective, Mead has largely ignored the lower Court's reasonable interpretation of this plan's unique "benefit rights and contingent rights accrued under the plan" language, and given the Court's alternative ground, relating to the plan's "actuarial error" restriction, an unnecessarily broad reading. It has assumed, erroneously, that all plans that terminated between 1980 and 1989 provided subsidized early retirement benefits; and contained language that is indistinguishable from the Mead plans; and failed to pay those benefits. Mead further assumes that, unlike Mead's plan, all of those plans' surplus assets represented the effect of cancelling participants' earned early retirement benefits. Gilding the lily, Mead ignores the effects of statutes of limitation and the doctrine of laches and assumes that every affected ex-participant will become a plaintiff. On those bases, Mead predicts, the entire pension world is about to be washed away in a flood of litigation.

Apparently, Mead's assertion that the PBGC may face significant liability if the lower Court's decision is left undisturbed is based upon Mead's erroneous understanding of the scope of the "Notice of Sufficiency" PBGC routinely issued to Mead and to other plan administrators. *See*, p. 14, *supra*. As we have seen, PBGC insures only *guaranteed* benefits and the benefits at issue here are not and were not guaranteed. PBGC recognizes that litigation has drained this case of its significance. Since, on its own initiative, it supported Mead's first petition for *certiorari* here, PBGC has participated actively in every phase of this litigation. Yet, though it advised the lower Court that it disagreed with its ruling, PBGC has not joined Mead's attempt to have this Court review the controversy once again.²⁰ PBGC's silence now demonstrates the implausibility of Mead's assertion that the narrow holding below threatens to bankrupt PBGC and the pension system.

As we have already pointed out, another premise of Mead's jeremiad is that the language the lower Court parsed is found in all plans. It is not. We have searched a host of model plans and the American Association of Retired Persons has examined the pension plans of some of the nation's largest employers without finding a single document that uses the phrase "all benefit rights or contingent rights accrued under the Plan," which the court below construed here. *See Brief Amicus Curiae Of American Association of Retired Persons In Opposition To Appellee's Petition For Rehearing And Suggestion For Rehearing En Banc* at p. 9. Petitioner's *amici* state that "Mead's Plan and all others include *virtually* identical terms regarding the contingent liabilities that must be paid before reversion of surplus assets can occur." (Pet. p. 10.) Like beauty, "virtual identity" is "in the eye of the beholder," and "virtually" implies that in fact the language in other plans is different. Given the protection

²⁰ As the Court knows, PBGC has independent litigating authority.

REA afforded early retirement benefits beginning shortly after Mead's termination, Mead's speculation about the likely impact of the lower Court's narrowly written decision upon other plan terminations is dubious. Indeed, if Mead's prophecy of a flood of litigation were correct, one would expect to see far more than the handful of pre-REA cases brought in the nearly five years since the lower Court's first favorable decision.

In short, despite Mead's hyperbole, this case comes down to an insignificant disagreement between Mead and respondents over the meaning of particular phrases in the Mead instrument. The lower Court disagreed with Mead and held that, as drafted, this particular plan document gave participants termination rights somewhat broader than those which Mead contends the law in effect in 1983 required. We respectfully submit that the lower Court did not commit a violence to the pension system by interpreting the instrument before it against the draftsman and in favor of the employee and beneficiaries for whom Congress enacted the very statutory scheme which petitioner invokes. *Landro v. Glendenning Motors, Inc.*, 625 F.2d 1344 (8th Cir. 1980). This case, which has already dragged on for more than seven years, deserves closure. These five retirees should not be asked to bear the burden of litigating issues that, if at all significant for future cases, are governed by a new statute that does not apply to them. *Certiorari* should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny Mead's petition.

Respectfully submitted,

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APPENDICES

SAMPLE IRS FORMS

Worksheet 7

Form 5310

(Rev. Nov. 1987)

Department of the Treasury
Internal Revenue Service

Pension Benefit
Guaranty Corporation

Sample of Form 5310 Used for Application for Determination Upon Termination; Notice of Intent to Terminate, Including Instructions

Application for Determination Upon Termination; Notice of Merger, Consolidation or Transfer of Plan Assets or Liabilities; Notice of Intent to Terminate

(Under sections 401(a) and 4058(b) of the Internal Revenue Code and section 4041(a) of the Employee Retirement Income Security Act of 1974)

OMB No. 1545-0042
Exp. Date 12-31-88
For Agency Use Only

Complete every applicable part of this form. If an item in an applicable part does not apply, enter N/A.
Multiemployer plans covered by PBGC insurance program: see Purpose on page 1 of the instructions.

Reason for filing (check applicable box(es); see General Instructions):

- ☐ A Notice of plan—(i) Merger, (ii) Consolidation, or (iii) Transfer of plan assets or liabilities to another plan.
☐ B Application for ONLY an Internal Revenue Service (IRS) determination letter regarding a plan termination. (THIS IS NOT a notice of intent to terminate for the Pension Benefit Guaranty Corporation.)
☒ C Defined benefit plan filing "ONE STOP" (One-Stop filing is a voluntary choice in lieu of separate filings under B and D for):
(i) Notice of intent to terminate under the Pension Benefit Guaranty Corporation (PBGC) termination insurance program AND
(ii) Application for an IRS determination letter upon plan termination.
☐ D Defined benefit plan filing ONLY a notice of intent to terminate under the PBGC termination insurance program. (THIS IS NOT a request for an IRS determination letter.)

Part I All Filers Complete This Part

1 (a) Name of plan sponsor (see instructions):

Manufac Corporation

Address (number and street)

20425 Connecticut Avenue

City or town, state, and ZIP code

Washington, D.C. 20550

2 (a) Name of plan administrator (if same as 1(a), enter "same")

Pension Plan Committee

Address (number and street)

Same as above

City or town, state, and ZIP code

3 (b) Administrator's employer identification number

61-xxxxxx

3 (c) Administrator's telephone number

() Same as above

2 (d) Name, address, and telephone number of person to be contacted if more information is needed (see instructions):

Name Harry Barrister, Esquire

Address 1000 Tenth Avenue, Washington, D.C. 20000

3 (e) Office of the District Director of the key district where sponsor is located (see instructions):

Atlanta, Georgia

3 (f) If you checked reason for filing B, C, or D, has each party who is required to be notified been properly informed of this filing (see instructions)?

(a) ☒ Single-employer plan (b) ☐ Multiple-employer plan (other than a multiemployer plan) (c) ☐ Yes (d) ☐ No

4 Type of plan entity (check only one box; see instructions):

(a) ☒ Single-employer plan

(b) ☐ Plan of certified group of corporations or business under common control

(c) ☐ Multiple-employer-collectively-bargained plan (other than a multiemployer plan)

(d) ☐ Multiple-employer plan (other)

(e) ☐ Other (specify)

5 (a) Plan name

Manufac Corporation Pension Plan

(b) Plan number

0101

(c) Plan year ends

12/31

6 (a) Is this a defined benefit plan covered under the Pension Benefit Guaranty Corporation termination insurance program (see Part IV instructions)?

(i) ☒ Yes (ii) ☐ No (iii) ☐ Not determined

(b) If you checked "Yes" or "Not determined," have you ever used an employer identification number or plan number in any prior filing with PBGC other than the ones entered on lines 1(b) or 5(b) above? ☐ Yes ☒ No

If "Yes," enter the number(s) previously reported:

7 Indicate type of plan (see General Instruction D):

(a) ☐ Defined benefit

(i) ☐ Fixed benefit

(ii) ☒ Unit benefit

(iii) ☐ Flat benefit

(b) ☐ Money purchase

(c) ☐ Profit-sharing

(d) ☐ Other (specify)

Under penalties of perjury, I declare that I have furnished this information, including accompanying documents, and to the best of my knowledge and belief it is true, correct and complete.

Signature of Title of Date of

For Paperwork Reduction Act Notice, see page 1 of the instructions.

Enter the number of samples, and press \square .

Enter the number of participants employed for the current plan year and each of the 5 prior plan years on the schedule below:

11/10/2014

As a result of the termination, are accrued benefits or account balances nonforfeitable as required under Code section 411(d)(2)?

(b) Will the trust continue to operate after termination of the plan (see instructions)?

Were any funds contributed in the form of, or invested in, obligations or property of the employer or any group of corporations or group of trades or businesses under common control?

(c) Will distribution include property other than cash?

(d) For a defined benefit or money purchase plan, do you estimate there will be an accumulated funding deficiency as of the end of the plan year during which the proposed termination date occurs, if no additional plan contributions are made?

(i) If there are unallocated funds which can be reallocated to participants without exceeding the limitations of Code section 415, have these funds been reallocated?

(ii) If (i) is "Yes," did the plan originally contain a provision allowing this allocation?

(iii) If (ii) is "No," was the plan amended to provide for this allocation?

(2) Will any funds be, or have any funds been, returned to the employer? If uncertain check "Not Applicable." If "Yes," enter the estimated amount ▶ \$

Is this plan or trust currently under examination or is any issue relating to this plan or trust currently pending before the Internal Revenue Service, the Department of Labor, the Pension Benefit Guaranty Corporation or any court? . . .

If "Yes," attach a statement naming the agency(s) and/or court and briefly describing the issues. Did any plan participant during the current plan year or in the 5 prior plan years receive a lump-sum distribution (see instructions) or have an annuity contract purchased by the plan from an insurance company on his or her behalf? . . .

If "Yes," state the largest amount so distributed or applied to purchase an annuity contract. Is this a Keogh (R.R. 50) plan? . . .

If "Yes," is an owner/employee covered under the plan? . . .

If an owner/employee is covered under the plan, will distribution be made to him or her before he or she reaches age 59½? . . .

Does the plan have ESOP/ERISA features? . . .

18 Defined contribution plans (other than money purchase plans) such as profit-sharing, stock bonus, or other such plans where forfeitures are credited to individual account balances, enter the information for the current plan year and the 5 prior plan years on the following schedule:

	19	19	19	19	19	Current year
(a) Employer contributions						
(b) Forfeitures						
(c) Explain basis on which forfeitures were allocated:						

19 Indicate how distributions will be made on termination (check applicable box(es)):

- (a) ☒ Lump sum distribution
 (b) ☒ Annuity contract
 (c) ☐ Periodic payments from trust
 (d) ☐ Transfer of assets and liabilities to another plan
 (e) ☐ Other (specify) ▶

20 Statement of net assets available to pay benefits as of the proposed date of plan termination. Read specific instruction 20, and if you checked Reason for Filing C or D, read specific instruction 25(c) before completing this item.

Assets	
(a) Cash and cash equivalents	\$164,505.00
(b) Receivables—	
(i) Employer contributions	
(ii) Other	40,000.00
(c) Party-in-interest investments—	
(i) Loans to employer	
(ii) Employer securities	
(iii) Other	
(d) Other investments—	
(i) Government securities	
(ii) Pooled funds/mutual funds	150,000.00
(iii) Corporate (debt and equity instruments)	155,000.00
(iv) Real estate and mortgages	
(v) Other	
(e) Buildings and other depreciable property	
(f) Unaffiliated insurance contracts	
(g) Other assets	
(h) Total assets (add lines (a) through (g))	504,505.00
Liabilities and Net Assets	
(i) Accounts and notes payable—	
(i) Part due benefits	
(ii) Employer	
(iii) Other	
(j) Accrued expenses	
(k) Mortgages payable	
(l) Acquisition indebtedness	
(m) Other liabilities	
(n) Total liabilities (add lines (i) through (m))	
(o) Net assets available to pay benefits (subtract line (n) from line (h))	\$504,505.00

Part IV Complete this Part if you checked Reason for Filing C or D and checked "Yes" on line 6(s). If you checked Reason for filing C or D and "Not determined" on line 5(s), completion of this part is optional. However, if you do not complete this part, you must file the plan document, any amendments to the plan document, and the IRS determination letter(s) for the plan as described for lines 22(b), (c) and (g). If PBCC later determines that the termination insurance program covers the plan, you must file the remainder of the information required by this Part (see Part IV instructions).

21 (a) Name(s) of labor organization(s) representing plan participants None	(b) Telephone number ()
Address (number and street)	(c) Name of principal officer
City or town, state, and ZIP code	(d) Title of principal officer

22 Indicate the applicability of items (a) through (i) by checking the appropriate column. Attach each item that is applicable (see instructions):	Appl. cable	Not applicable
(a) Power of attorney. File 2 copies if you are filing "one-stop" (see General instruction H)	<input checked="" type="checkbox"/>	<input type="checkbox"/>
(b) Copy of executed plan document	<input checked="" type="checkbox"/>	<input type="checkbox"/>
(c) Copy of executed amendment(s) to the plan document	<input checked="" type="checkbox"/>	<input type="checkbox"/>
(d) Copy of executed group annuity or group insurance contract(s)	<input checked="" type="checkbox"/>	<input type="checkbox"/>
(e) Copy of executed trust agreement(s)	<input checked="" type="checkbox"/>	<input type="checkbox"/>
(f) Copy of executed collective bargaining agreement(s)	<input checked="" type="checkbox"/>	<input type="checkbox"/>
(g) Copy of IRS determination letter(s)	<input checked="" type="checkbox"/>	<input type="checkbox"/>
(h) Copy of the most recent actuarial report	<input checked="" type="checkbox"/>	<input type="checkbox"/>
(i) Copy of the most recent financial statement of plan assets	<input checked="" type="checkbox"/>	<input type="checkbox"/>

23 Indicate the sufficiency of plan assets (see instructions):

(a) Are any participants entitled to receive benefits assigned to categories 1 through 4 under ERISA section 4044?	Yes	No
If "Yes," complete (b); if "No," enter N/A in (b), (c), (d), and (e)	<input checked="" type="checkbox"/>	<input type="checkbox"/>
(b) Do you estimate that plan assets (excluding any amount described in (d) below) are adequate to provide all the benefits assigned to categories 1 through 4 on the proposed date of plan termination?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
If "Yes," enter N/A in (c) and complete item (d); if "No," complete (c) and (e)	<input checked="" type="checkbox"/>	<input type="checkbox"/>
(c) Indicate the estimated amount by which the value of benefits in categories 1 through 4 exceeds the value of plan assets on the proposed date of plan termination: \$100,000	<input checked="" type="checkbox"/>	<input type="checkbox"/>
(d) Is the employer making a commitment (in the form prescribed in the PBCC regulation on determination of plan sufficiency) before the proposed date of plan termination to pay, on or before the date assets are distributed, the amount needed to provide all benefits in categories 1 through 4?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
If "Yes," attach a signed copy of the commitment. If "No," complete (e). See attached	<input checked="" type="checkbox"/>	<input type="checkbox"/>
(e) Has the plan sponsor paid or does the sponsor intend to pay employer liability as prescribed in the PBCC regulation on employer liability before PBCC's request for payment?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Note: Interest on employer liability will accrue from the date of plan termination.	<input checked="" type="checkbox"/>	<input type="checkbox"/>

24 Submit participant data schedules in the format shown in the instructions for the following groups of participants:

(a) Retired participants and beneficiaries receiving benefits from the plan: See attached	<input checked="" type="checkbox"/>
(b) Participants separated from service not yet receiving vested benefits from the plan; and	<input checked="" type="checkbox"/>
(c) All other participants with vested or non-vested accrued benefits.	<input checked="" type="checkbox"/>

25 Indicate the information you are filing with this notice by checking one of the following boxes (see instructions):

(a) <input checked="" type="checkbox"/> I am filing a complete Form 5310 including required attachments.	<input type="checkbox"/>
(b) <input type="checkbox"/> I am filing a complete Form 5310 except the information showing plan assets allocated to participants (see note below).	<input type="checkbox"/>
(c) <input type="checkbox"/> I am filing a complete Form 5310 except plan asset information (line 20) and participant data schedules (line 24). I will file the information required by lines 20 and 24 within 90 days after the date of this filing. (See note below.) By not filing lines 20 and 24 with the form, I am agreeing to extend the 90-day period prescribed by ERISA section 4041(s) during which I will not make any distributions pursuant to the proposed termination of the plan.	<input type="checkbox"/>
(d) <input type="checkbox"/> With this form I am filing a request for an extension of time to file the information required by line(s) (other than the information required by lines 20 and 24). (See note below.) For more information about extensions see the instructions.	<input type="checkbox"/>

Note: If you checked reason for filing C and you are not sending all the information required in Parts I, III, IV, and either completed Form(s) 6088 or a second copy of the complete participant data schedules described in the line 24 instructions of Form 5310, the 270-day period prescribed by Code section 7476(b)(3) will not commence until you file the remaining required information.



APPENDIX B

APPLICABLE STATE STATUTES OF LIMITATIONS

Alabama:	Ala. Code § 6-2-33 (1990) (six years).
Alaska:	Alaska Stat. § 09.10.060 (1990) (six years).
Arizona:	Ariz. Rev. Stat. Ann. § 12-548 (1990) (six years).
Arkansas:	Ark. Stat. Ann. § 16-56-111(b) (Supp. 1991) (five years).
California:	Cal. Civ. Proc. Code § 337 (West 1982) (four years).
Colorado:	Colo. Rev. Stat. § 13-80-101 (1987) (three years).
Connecticut:	Conn. Gen. Stat. § 52-576 (1990) (six years).
Delaware:	Del. Code Ann. tit. 10, § 8111 (1974) (one year).
District of Columbia:	D.C. Code § 12-301 (1989) (three years).
Florida:	Fla. Stat. Ann. § 95.11(2) (West 1982) (five years).
Georgia:	Ga. Code Ann. § 9-3-24 (1991) (six years).
Hawaii:	Haw. Rev. Stat. § 657-1 (1989) (six years).
Idaho:	Idaho Code § 5-216 (1980) (five years).
Illinois:	Ill. Rev. Stat. ch. 110, para. 13-206 (1982) (ten years).
Indiana:	Ind. Code Ann. § 34-1-2-1(5) (Burns 1986) (two years).*
Iowa:	Iowa Code Ann. § 614.1(2) (West Supp. 1991) (ten years).

* See *Kemper v. Warren Petroleum Corporation Inc.*, 451 N.E.2d 1115 (Ind. App. 2d Dist. 1983)

Kansas:	Kan. Civ. Proc. Code Ann. § 60-511(1) (Vernon 1976) (five years).
Kentucky:	Ky. Rev. Stat. Ann. § 413.090 (Baldwin Supp. 1990) (fifteen years).
Louisiana:	La. Code Civ. Proc. Ann. art. 3499 (West Supp. 1991) (ten years).
Maine:	Me. Rev. Stat. Ann. tit. 14 § 752 (1990) (six years).
Maryland:	Md. Cts. & Jud. Proc. Code Ann. § 5-101 (Supp. 1991) (three years).
Massachusetts:	Mass. Ann. Laws ch. 260 § 2 (1991) (six years).
Michigan:	Mich. Stat. Ann. § 600.5807(8) (1990) (six years).
Minnesota:	Minn. Stat. § 541.05 (1990) (six years).
Mississippi:	Miss. Code Ann. § 15-1-49 (1990) (six years).
Missouri:	Mo. Ann. Stat. § 516.120(1) (Vernon 1949) (five years).
Montana:	Mont. Code Ann. § 27-2-202 (Supp. 1991) (eight years).
Nebraska:	Neb. Rev. Stat. § 25-205(1) (1989) (five years).
Nevada:	Nev. Rev. Stat. § 11.190 (1989) (six years).
New Hampshire:	N.H. Rev. Stat. Ann. § 508:4 (Supp. 1990) (six years).
New Jersey:	N.J. Rev. Stat. § 2A. 14-1 (1990) (six years).
New Mexico:	N.M. Stat. Ann. § 37-1-3 (1991) (six years).
New York:	N.Y. Civ. Prac. L & R § 213 (McKinney 1991) (six years).
North Carolina:	N.C. Gen. Stat. § 1-52 (1983) (three years).
North Dakota:	N.D. Cent. Code § 28-01-16 (1987) (six years).

Ohio:	Ohio Rev. Code Ann. § 2305.06 (Anderson 1990) (fifteen years).
Oklahoma:	Okla. Stat. Ann. tit. 12, § 95 (West 1988) (five years).
Oregon:	Or. Rev. Stat. § 12.080 (1990) (six years).
Pennsylvania:	Pa. Stat. Ann. tit. 42, § 5527 (Purdon Supp. 1991) (six years).
Rhode Island:	R.I. Gen. Laws § 9-1-13 (1956) (ten years).
South Carolina:	S.C. Code Ann. § 15-3-530 (1991) (six years).
South Dakota:	S.D. Codified Laws Ann. § 15-2-13 (1991) (six years).
Tennessee:	Tenn. Code Ann. § 28-3-109 (1990) (six years).
Texas:	Tex. Civ. Prac. & Rem. Code Ann. § 16.051, Vernon 1985) (four years).
Utah:	Utah Code Ann. § 78-12-23 (1991) (six years).
Vermont:	Vt. Stat. Ann. tit. 12 § 511 (1990) (six years).
Virginia:	Va. Code Ann. § 8.01-246(2) (1950) (five years).
Washington:	Wash. Rev. Code § 4.16.040 (1990) (six years).
West Virginia:	W. Va. Code § 55-2-6 (1981) (ten years).
Wisconsin:	Wis. Stat. § 893.43 (1979) (six years).
Wyoming:	Wyo. Stat. § 1-3-105 (1977) (ten years).